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No. 673

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOHN M. WINTERS, JR., and MARIAN M. WINTERS,
PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The District Court's findings of fact and conclusions of law (Pet. 9-13) are not reported. The opinion of the Court of Appeals (Pet. 14-28) is reported at 261 F. 2d 675.

JURISDICTION

The judgment of the Court of Appeals was entered on November 13, 1958 (Pet. 14). The petition for a writ of certiorari was filed on January 29, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether taxpayer, a lawyer, is entitled to deduct from gross income, as an ordinary and necessary business expense under Section 162(a) of the Internal Revenue Code of 1954, the cost of liquor used for entertaining clients, where such use was found to be contrary to state law.

STATUTES INVOLVED

Section 162(a) of the Internal Revenue Code of 1954 provides in part as follows:

> There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *.

Pertinent provisions of the Oklahoma Statutes Annotated are set forth at pages 29-37 of the petition.

STATEMENT

In a joint federal income tax return filed for the year 1954, petitioner John M. Winters ("taxpayer") and his wife claimed, as a deduction from gross income, $301.75 constituting the cost of four cases of whiskey which taxpayer, a lawyer in the City of Tulsa, Oklahoma, had used for entertaining clients in his home (Pet. 9-10). Oklahoma is a so-called "dry" state (Pet. 19). The Internal Revenue Service disallowed the deduction. Petitioner paid the deficiency and then sued in the District Court for refund. The District Court granted the refund, but the Court of Appeals (one judge dissenting) reversed.

Relying on a recent statement by the highest Oklahoma appellate criminal court that "the state policy [reflected in the state constitution and statutes] is to prohibit possession of intoxicating liquor for every purpose 'except for the personal use of the possessor' " (Pet. 20), the court below held that since "the liquor was possessed and used for business purposes" (Pet. 21), it "was not for the personal use of the possessor and hence was a violation of the state policy expressed in the state constitution and statutes and clearly defined by the highest court of the state" (Pet. 22). The court further ruled that even though taxpayer's "'purchase [of whiskey] was not unlawful" under Oklahoma law (Pet. 23), allowance of a deduction therefor would nonetheless involve a "severe and immediate frustration of state policy" (Pet. 25; see Pet. 22). It pointed out (Pet. 23) that the "expenditure was for an illegal purpose, that is, to acquire possession of the whiskey for a purpose contrary to the Oklahoma statute"; that "accomplishment of this illegal purpose" required the importation of the whiskey into Oklahoma in violation of federal and state law; and that the "possession, conveyance and sale of the whiskey by taxpayer's vendor violated Oklahoma law" (*ibid.*). The court held that the fact that it is the usual practice of attorneys engaged in general practice in Oklahoma to purchase liquor in entertaining their clients [1] does not justify the deduction, since "[w]e are not concerned * * * with what a small group would seek to establish as Oklahoma

[1] The District Court so found (Pet. 10).

policy by a claim of custom and usage" but with the State's actual policy (Pet. 25). Finally, the court pointed out (*ibid.*) that this is "not a case of a taxpayer becoming innocently involved in an illegal transaction," but is "one where a taxpayer deliberately and knowingly patronized an illegal business."

ARGUMENT

1. In holding that petitioners are not entitled to deduct the cost of liquor used in entertaining clients in the "dry" State of Oklahoma, the court below correctly applied the settled principle, recently reaffirmed by this Court, that business expenses cannot be deducted as "necessary to carrying on the taxpayer's business * * * if allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof." *Tank Truck Rentals, Inc.* v. *Commissioner*, 356 U. S. 30, 33-34; *Lilly* v. *Commissioner*, 343 U. S. 90, 96-97; *Commissioner* v. *Heininger*, 320 U. S. 467, 473. The Court of Appeals held that allowance of the deduction would involve a "severe and immediate frustration" of state policy (Pet. 25) in two important respects: (1) it would contravene the policy that possession of liquor is lawful only for the personal use of the possessor, but not for business purposes; (2) it would sanction violations of state and federal law arising out of the importation of the liquor into the state, and its possession, conveyance and sale by the seller to taxpayer. This policy is reflected in Oklahoma statutes and judicial decisions (Pet. 19-20, 23).

Here, therefore, unlike *Commissioner* v. *Heininger*, 320 U. S. 467, 474, the expenditures did not have merely "a remote relation to an illegal act." On the contrary, as the Court of Appeals stated (Pet. 23), "a law violation directly preceded and directly followed the expenditure claimed to be deductible," and "[a]ll of these illegal acts were necessary to the attainment of the objective of the taxpayer which was to develop and retain the business of the law partnership to which he belonged by entertainment which included the serving of alcoholic liquor."

2. Contrary to petitioners' contention (Pet. 3-4), the question presented is not of general importance in the administration of the revenue laws.

In the first place, as the court below noted (Pet. 24), this case presents a "unique" situation, since only Oklahoma and Mississippi have statewide prohibition laws. The question, therefore, necessarily can arise only in those two states.

Furthermore, the decision below ultimately turns upon an interpretation of Oklahoma law and policy with respect to the possession and sale of intoxicating liquors for non-personal use, and the extent to which that law and policy would be frustrated by allowing a deduction for the cost of such liquor. Those are questions which, as this Court has indicated (*Commissioner* v. *Heininger*, 320 U. S. 467, 473), necessarily must "depend upon [the] peculiar circumstances" of each case. See, also, *Fuller* v. *Commissioner*, 213 F. 2d 102, 106 (C. A. 10). We submit that the court below correctly concluded that permit-

ting the deduction here would involve such a "severe and immediate" frustration of state policy as to require its disallowance. See *Tank Truck Rentals, Inc.* v. *Commissioner*, 356 U. S. 30, 35.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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